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IN THE

Supreme Court of the United States

EMILIA STROGOV

Petitioner,

v.

STATE OF NEW YORK

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*VIVIAN SHEVITZ
JANE SIMKIN SMITH
5 Holly Branch Rd.
Katonah, New York 10536
(914) 767-0262
Counsel for Petitioner

*Counsel of Record

79PP

QUESTION PRESENTED

Whether the term "fairly presented" in the context of the "exhaustion" requirement for State *habeas* petitioners pursuant to 28 U.S.C. §2254 should be read so restrictively as the Second Circuit did here, to deprive a Petitioner of review on the merits when the highest Court of the State of New York *actually* considered the claim that was then presented to the federal *habeas* Court (*i.e.*, lack of "notice" that the conduct was illegal), but the claim was *also* addressed by that Court in related terms (*i.e.*, whether the unexplained Medicaid Code was "vague" in establishing a supposed "requirement" that its use "required" the making of a plaster cast.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Prosecutor, Special Prosecutor for Medicaid Fraud Control, Attorney General, State of New York; defendant EMILIA STROGOV.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

PERTINENT STATUTORY PROVISION 2

STATEMENT OF THE CASE.....2

REASON FOR GRANTING THE WRIT 17

The Court Should Grant *Certiorari* to Clarify the Meaning of the "Fair Presentation" Requirement of the Habeas Rule; Especially Given the Fact That a Wrongfully-Convicted State Citizen is Now Restricted by the AEDPA to His or Her "One Bite At The Apple", The Federal Courts Should Not Restrict Federal Review of Serious Constitutional Issues by an Unduly Restrictive Interpretation of the Exhaustion Requirement 17

CONCLUSION 23

APPENDIX TABLE OF CONTENTS.....iv

APPENDIX:

Judgment Denying Rehearing, Entered February 3, 2000 ..... A1

Opinion of Second Circuit A3-A14

Opinion of New York Court of Appeals A15-A20

Petition For Rehearing In Second Circuit A21-A34

28 U.S.C. § 2254 (in part) A35-A37

Opinion of District Court Denying Habeas A38-A48

TABLE OF AUTHORITIES

Cases: Page:

Anderson v. Harless, 459 U.S. 4 (1982) 20

Daye v. Attorney General, 696 F.2d 186 (2d Cir. 1982) (en banc), *cert. denied* 464 U.S. 1048 (1984) 16

Gray v. Netherland, 518 U.S. 152 (1996) 18

Harris v. Scully, 779 F.2d 875 (2d Cir. 1985) 16

Lilly v. Virginia, 527 U.S. 116 (1999) 18, 21

People v. Rubin, 101 A.D.2d 71 (4th Dept. 1984) *passim*

People v. Strogov (McDonald), 88 N.Y.2d 281, 644 N.Y.S.2d 670 (1996) 16

Picard v. Connor, 404 U.S. 270 (1971) 15, 17, 18

Sandstrom v. Montana, 442 U.S. 510 (1979) 20

Taylor v. Illinois, 484 U.S. 400 (1988) 18, 20

Statute:

28 U.S.C. § 2254 ..... 12 and A50-A52

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The decision of the Court of Appeals holding that Petitioner did not properly "exhaust" State remedies because the issue was not "fairly presented" to the State Court is reported at 191 F.3d 188 and is reprinted in App. at A-3-14. The decision of the New York Court of Appeals is reprinted at A15-20.

JURISDICTION

The judgment affirming the denial of the Writ was rendered September 9, 1999. The judgment denying rehearing

was entered on February 3, 2000 (A-1). Jurisdiction is invoked under 28 U.S.C. §§1254(1) and 2101(c).

PERTINENT STATUTORY PROVISIONS

28 U.S.C. §2254 is reprinted in the Appendix, A35-A37.

STATEMENT OF THE CASE

Dr. Emilia Strogov, then a licensed New York podiatrist and an authorized Medicaid provider, was charged with submitting fraudulent Medicaid billing claims for podiatric orthotic appliances. She was convicted, after a non-jury trial in Supreme Court, Kings County, New York of one count of Larceny in the Second Degree (Penal Law § 155.40[1]).

The theory of the prosecution rested on the meaning of a particular code ("90473") contained only in the applicable Medicaid fee schedule and defined nowhere else. According to the prosecution, use of this code by a podiatrist in a Medicaid claim was a statement that the podiatrist had used plaster cast or other three-dimensional technique for measuring the patient's feet in connection with the prescription for an orthotic device. Because Dr. Strogov had used a different method (the two-dimensional "stained impression" or "pedograph" method), she was guilty of fraud.

Dr. Strogov freely admitted that she had used stained impressions to measure her patients' feet. Her defense was that, at the time of her conduct, Code 90473 had not required a plaster cast -- certainly not unambiguously so. Code 90473's terms were: "Foot mold, balance inlay support (casting and

fabrication)". Dr. Strogov understood the applicability of the fee code to depend on the type of appliance that she prescribed and dispensed – *i.e.*, one that required a custom measurement – not on whether specifically a plaster cast had been used to measure patients' feet.

At the time of the events in question, there was no published rule, regulation, case or statute stating that use of Code 90473 required use of a plaster cast to make an actual mold of the patient's foot. The prosecution relied instead solely on the testimony of a Medicaid administrator, Joseph Guy, to argue that Code 90473 required, and had always required, a plaster cast.

Guy testified that the Code language -- "Foot mold, balance inlay support (casting and fabrication)" -- meant that a plaster cast was required because of the presence in the parenthetical of the term "casting". According to Guy, the Code had always and unequivocally required the making of a poured plaster cast, no other method of measurement had ever been permitted, and Medicaid had never recognized any ambiguity about what the Code required.[1]

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[1] In an effort to bolster Guy's "understanding" of the Code's "requirements" -- the sole support for this criminal conviction -- the prosecution presented testimony of two podiatrists: Dr. Walter, an "expert" licensed in Pennsylvania who had no experience with the New York Medicaid system other than having served as an "expert" for the same prosecutors in a trial some months earlier, and Dr. Joseph D'Amico, former chairman of the division of orthopedics at

The defense introduced documents prepared by the New York Department of Health suggesting that there was no requirement under 90473 that a plaster cast be made. To the contrary, the documents supported the conclusion that, whether or not 90473 or a different fee code was applicable depended on the design of the appliance and its therapeutic purpose, not on the method of measurement.[2]

New York College of Podiatric Medicine, where Dr. Strogov had trained. Both testified that plaster casts are a *superior* method for making orthotics than tracing or staining. Neither said the Code "required" the use of a plaster cast.

[2] Defense Exhibit "A" was a 1970 letter from the Department's Bureau of Medical Care to local Medicaid program directors, written "to provide clarifying information regarding applicable fees and certain prosthetic services which may be provided by qualified podiatrists under the Medical Assistance Program." The letter was sent to the Department of Social Services for distribution to all local social service districts and, "in accordance with usual policy," it was also sent to the State Podiatric Society. In relevant part, the letter, discussing predecessor Code P602 (whose language was identical to the Code at issue here), stated as follows:

> . . . [T]he following clarification has been received from the Podiatry Society of the State of New York regarding Podiatry Fee item P602, Foot mould, balance, inlay support (casting and fabrication).
>
> Such appliances are "designed to fix joint position, control degree and direction of

> motion, redistribute weight and relieve muscle and ligament tension." The appliances are "generally made over a plaster of Paris positive model. Materials used in the fabrication will include various combinations of metal, cork, leather, rubber, felt and plastics. Supports are custom-made for the individual patient and are placed within shoes (and) the appliance is transferable from one pair of shoes to another." (Emphasis added.)

Defense Exhibit "B" was a March, 1988, letter from the Assistant Director of the Department of Health's Bureau of Standards Development, to a Medicaid Fraud prosecutor. Apparently responding to a request for an explanation as to the distinction between codes 90473 and 90477, the official wrote (emphasis added):

> Consultants in Podiatric Physical Therapy and Orthotics have provided definitions of "balance inlay support," and "foot mold customized from stock". The consultants define those terms as follows:
>
> > A "balance inlay support" [the 90473 orthotic] is custom made with posting (use of wedges, supportive materials, etc.) applied for biomechanical correction. Casting is

Notwithstanding this evidence from State and local officials, the prosecution used Guy's testimony to argue to the court (sitting as trier of fact) that Dr. Strogov's intent to steal could be inferred from her mere use of the code, because, per Guy, "casting" was a clearly understood term that could only mean a plaster cast, and only a podiatrist bent on theft would have billed under that code without making a plaster cast. The Court agreed, and found Dr. Strogov guilty.

> frequently involved in the process. This support effects a change in biomechanical joint alignment and changes the overall position of the foot. (i.e. used for orthopedic problems)
>
> 2. A "foot mold customized from stock" [the 90477 device] is non-customized with no posting. It is contoured to the patient's foot but is made from regular non-customized materials generally kept in stock. Biomechanical correction is not a goal for this type of mold; rather, it provides cushioning or protection for the foot. (i.e. used for painful foot conditions such as Rheumatoid Arthritis, etc.)

The conviction was affirmed by the State Appellate Division, Second Department on June 12, 1995, People v. Strogov, 216 A.D.2d 424 (2d Dept. 1995), and the New York Court of Appeals on April 30, 1996, People v. McDonald, 88 N.Y. 281 (1996). On appeal, Dr. Strogov had challenged both the underlying premise of the prosecution -- that the language of the code clearly and unambiguously gave notice that a plaster cast was "required" - as well as the corollary that the mere use of the code by a podiatrist who actually provided appliances to patients when no plaster cast was made was legally sufficient to support a finding of fraudulent intent.

Dr. Strogov showed, indeed, how the prosecution's position was belied by its own previous concession (in an earlier prosecution and appeal in People v. Rubin, 101 A.D.2d 71 (4th Dept. 1984)-the *only* existing case law construing that provision at the time of her conduct) that the Code could be used for billing when orthotics were made from stained impressions and did not require a plaster cast. As Dr. Strogov put in it in her brief to the New York Court of Appeals, "The fact that those charged with prosecuting Medicaid violations, and indeed a Medicaid expert who testified in Rubin, believed in 1983-84 that "casting and fabrication" under the Medicaid code for orthotics was not limited to plaster casts, but included stained impressions, and that the agency charged with administering Medicaid specifically had given such advice to podiatrists in 1980, puts the lie to the prosecutor's contention that a plaster cast was always required and supports Dr. Strogov's honest belief that stained impressions satisfied the code. There was no basis for Dr. Strogov's prosecution for

fraud, let alone evidence to support her conviction, and her conviction should be reversed and the indictment dismissed."

People v. Rubin, 101 A.D.2d 71 (4th Dept. 1984), was, indeed, the only published case on the issue at the time of this prosecution, and it upheld a trial court's express *rejection* of the Medicaid Fraud prosecutor's theory that compensation under this code provision required plaster casting.

In her New York appeal, Dr. Strogov relied heavily on Rubin and its record (uncovered only after the prosecutor misrepresented what the Rubin case had entailed) to show that Guy's testimony about the meaning of the code and Medicaid's interpretation of it was not accurate or honest, and could not be relied upon by the Court or the prosecution to sustain the conviction: while Guy claimed that the code "unambiguously" required a plaster cast and that Medicaid had "always" interpreted the code this way, the *same* Medicaid Fraud prosecutor who handled Rubin *and* Petitioner's State appeal had ultimately conceded in Rubin that the language "casting and fabrication" as used in the fee code did not require a plaster cast, but rather, as Dr. Strogov believed here, that orthotics made from stained impressions satisfied the code.

Dr. Strogov also argued that the prosecutor, in a bad faith effort to negate the legal and factual significance of Rubin, had (in this case as well as in prior cases that reached the courts after the period of conduct but before Dr. Strogov's prosecution) had misrepresented the record and the holding of Rubin. Thus, she showed how, in at least two prior cases -- the ones now relied on as precedent -- the same prosecutor had advised the courts that the fee code at issue in Rubin was

different from the one involved in those cases; in fact, however, after examining the record, it is unequivocally true that the fee codes were identical. (Dr. Strogov thus argued to the New York appellate courts that this misrepresentation about Rubin undermined the validity and precedential value of the prior lower appellate court cases that had upheld the prosecutor's current position that the code's terms were unambiguous.)

Dr. Strogov framed her appeal to the State courts in terms of both legal insufficiency and fundamental unfairness. In the New York Court of Appeals, she argued that, as a consequence of the code's inherent ambiguity and the lack of evidence that Dr. Strogov was aware of its supposed requirements, the evidence was legally insufficient to sustain the conviction for larceny (premised only on the "meaning" of that Code provision).. She also complained that the prosecution – premised, as it was, on a factual theory which in Rubin, the State had conceded was invalid, and on legal arguments that misrepresented the record in Rubin -- violated due process.

In this connection, she argued that there was a "lack of notice" as to the code's requirements. She argued that not only had the State failed to provide notice of the code's requirements, but "the only description of what the Code `required' that appeared `on the books' in 1984, before the `offense conduct' began, was that described in Rubin – the last and only `word' on the subject at the time. Even if Dr. Strogov had sought a legal opinion as to the propriety of using pedographs [the staining method] …she would have been told that the Code allows the use of pedographs." (Reply Brief to

Court of Appeals, at pp. 18-19) She went on to complain that the prosecutor's effort to convict based on a theory the State had conceded was wrong in Rubin was reprehensible: A prosecution premised on "lies" not only warrants reversal under state law, but a conviction so based violates basic notions of Due Process under the Constitution.")

The focus of Dr. Strogov's appellate papers in the State courts was that the State's "proof" that reimbursement under code section 90473 unambiguously and invariably required the use of a three-dimensional casting technique was not acceptable, reasonable, or reliable in light of the State's contrary concessions in Rubin, and that, in any event, the State had failed to offer any evidence that Dr. Strogov, who used two-dimensional techniques for measuring her patients' feet, knew of the supposed three-dimensional "requirement." However, in making these arguments, she also made the interwoven claims that the code's terms were ambiguous and did not provide "notice" of such a requirement, that the only "judicial" notice was provided by Rubin which held that three-dimensional casting was not required, and that, in a string of cases following Rubin (and post-dating the conduct in issue here), the state courts had erroneously distinguished Rubin based on the Medicaid Fraud prosecutor's intentional and improper misrepresentations regarding the record in Rubin.

These notice arguments were echoed by the New York State Podiatric Medicine Association which filed an amicus curiae brief in the Court of Appeals. The Association argued not only that the mere use of the code, without more, does not demonstrate the requisite intent to defraud, and that the two-dimensional measuring technique used by Dr. Strogov was the

standard and accepted practice at the time, but also that the Department of Social Services had never clarified the meaning of the code's terms even when it became apparent that there was confusion among practitioners and other State departments administering the Medicaid program. (A-22)

The New York Court of Appeals -- which shockingly did not even *address* the showing that the State Medicaid prosecutors had indeed misrepresented the Rubin record in prior appeals--nonetheless unquestionably revealed its understanding that, at the heart of the appeal, was the issue of the adequacy of the notice of the code's requirements. Thus, in the opening paragraph of its opinion, People v. McDonald, 88 N.Y.2d 281 (1996) (reprinted at A15-20 herein), it summarized the holding of the Appellate Division as a ruling on "notice" and then stated its agreement with that ruling:

> The basis for these convictions was defendants' submission of claims to the Medicaid program for custom-made orthotics "cast and fabricated" to the patients' feet with the knowledge that they had not in fact provided such appliances to these patients. The Appellate Division affirmed each conviction, holding that the language of the applicable Medicaid billing code unambiguously provided notice that the creation of a three-dimensional cast of the patient's feet was required to seek reimbursement under this code (*People v McDonald, 215 AD2d 504; People v Strogov, 216 AD2d 424).* We agree and ... now affirm. (A-17-18; emphasis added.)

The Court did not discuss Rubin, or the significance of that case on the viability or reliability of Guy's testimony regarding the unambiguous and unchanging meaning of the code's terms. And, like the Appellate Division before it, it ultimately relied on Guy's testimony to support the conviction.

However, in doing so, the Court of Appeals again showed its appreciation of the "notice" issue and what is at stake when notice is not adequate. Thus, it held that the "use of technical terms" in the fee schedule "provides an explicit and nonarbitrary standard for enforcement of proper Medicaid billing practices and imposing criminal responsibility for flagrant violations thereof." (A-19)

After her state appeals, Dr. Strogov filed a petition for habeas corpus in federal court pursuant to 28 U.S.C. § 2254. In the federal courts, she argued (inter alia) that the larceny conviction was not supported with legally sufficient evidence, and that the conviction violated due process because she did not have sufficient notice that compensation under Medicaid procedure code 90473 required use of a three-dimensional mold. Again relying on Rubin and the prosecution's history of misrepresentations regarding that case, she pointed out that the code did not spell out the supposed "requirement," no published rule, regulation, statute, case or even position statement by Medicaid administrators stated that a three-dimensional mold was required, and that in Rubin (the only published case on the issue at the time she submitted claims using this code section), the court had expressly rejected the Medicaid Fraud prosecutor's theory that a three-dimensional mold was required.

In the face of the Medicaid Fraud prosecutor's suggestion to the District Court that, if it were to grant the writ, it would have to tell some 21 State judges who had dealt with issues concerning this Code that they were "wrong" (never mind that those decisions had been reached only because the Medicaid Fraud prosecutor had "hidden" his own concession in the earlier Rubin case), the District Court denied the writ. After agreeing with the State courts that there was sufficient evidence in the trial record to support the conclusion that the "podiatrist community understood code 90473 to require a three-dimensional mold of a patient's foot," the District Court adopted the prosecutor's position that Rubin was "different" because it involved a different *county*, and rejected the argument that Rubin demonstrated the inaccuracy of the evidence used against Petitioner in her case.[3]

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[3] The District Court held:

> Strogov also misconstrues the holding of the Appellate Division's opinion in People v. Rubin, 101 A.D.2d 71, 474 N.Y.S.2d 348 (4th Dep't 1984). In Rubin, the defendant-podiatrist's conviction was overturned because of an improper jury instruction, not because the court found that the code in question did not require casting. Id. at 76-77. In any event, Rubin involved a different factual context. See People v. Holmberg, 91 N.Y.2d 874, 663 N.Y.S.2d 334, 335-336 (3d Dep't 1997) (distinguishing Rubin scenario from the requirements of code 90473). While the language of the state code at issue in

In the Second Circuit, Dr. Strogov concentrated on the "notice" aspect of the issue. She argued that the constitutional due process question of whether the statutory scheme provided adequate notice of what was required could not be answered by simple resort to the trial testimony of Mr. Guy. Viewing his testimony in the light most favorable to the State, as in an evidentiary sufficiency claim, was jurisprudentially wrong.

The Second Circuit nonetheless affirmed (A3-14). However, instead of ruling that the evidence was "sufficient" or commenting on the serious problems in this prosecution, the panel sidestepped having to face the State judges, and ruled that the constitutional claim had not been "fairly presented" to the State courts on direct appeal from the conviction, and that this failure to comply with the *habeas* "exhaustion" requirement precluded the federal courts from entertaining the merits.

Rubin tracks that in code 90473 (as petitioner maintains), an Erie County guidelines handbook for practitioners interpreted the state code as follows: "A foot mold, balance, inlay support must be cast in plaster, castefoam or impression paper (e.g., pedograph, phenophthalein). . . ." Appellant's Appendix to N.Y. Ct. of App. ("Appellant's App.") at A220-21 (emphasis added). Given this interpretation, the Fourth Department acknowledged that two-dimensional measuring techniques, such as pedographs, were acceptable. See Rubin, 101 A.D.2d at 74-75. This is not the case here.

According to the Second Circuit, Dr. Strogov had relied on the code's purported ambiguity "only in the service of a broader argument that the prosecutor had not adequately proven that she acted with the requisite level of criminal intent." (A-11) While the Court conceded that, in her arguments in the State courts, "Strogov stated that the Code failed to provide `fair notice'", it found that she had done so only "in the course of arguing that the ambiguity functioned to undermine any evidence of larcenous intent."

"Despite the linguistic similarity between the `fair notice' aspect of her State court sufficiency claim, on the one hand, and the `fair notice' due process claim she presses in her federal habeas petition, on the other," the Second Circuit went on to hold, "these claims are otherwise distinct and cannot be said to be the `substantial equivalent' of one another." (A-11, citing, *Picard v. Connor,* 404 U.S. 270, 278 (1971).)

As the Second Circuit decided to view it, Dr. Strogov had pressed only an evidentiary sufficiency claim, not a conceptually distinct constitutional due process argument. When viewed "in context", the panel wrote, she had cited Rubin to the state courts only because it rebutted the prosecution's proof of intent. (A-12) . The Court then tried to make sure that this difficult issue would not be returned to the federal court, noting that the supposed "failure" to raise the "fair notice/due process" claim on direct review in the State courts foreclosed her from further seeking collateral relief on this ground in State court and that this "procedural default" thus also precluded federal review of the "notice" claim. Since, according to the Second Circuit, Dr. Strogov had made no showing of cause for the supposed default and prejudice

arising from imposing the bar of a default, and no showing that the denial of *habeas* relief would leave unremedied a "`fundamental miscarriage of justice' in the sense that because of a constitutional violation a person who is actually innocent has been convicted and incarcerated," it declined to reach the merits of the petition. (A-14).

Petitioner filed an application for rehearing (A21-A34), which we urge this Court to consider, pointing out that the opinion of the New York State Court of Appeals had *explicitly* noted that the "notice" issue had been rejected by the Appellate Division. People v. Strogov, 88 N.Y.2d 281, 285-86, 644 N.Y.S.2d 670 (1996) ("The Appellate Division affirmed each conviction, holding that the language of the applicable Medicaid billing code unambiguously provided notice that the creation of a three-dimensional cast of the patient's feet was required to seek reimbursement under this code (*People v McDonald, 215 AD2d 504; People v Strogov, 216 AD2d 424).* We agree and ...affirm.") (emphasis added).

We also pointed out that the Court's miserly reading of the "fairly presented" habeas rule conflicted with its own earlier decisions (habeas petitioner must have "informed the state courts of both the factual and legal premises of the claim he asserts in federal court." Daye v. Attorney General, 696 F.2d 186, 191 (2d Cir. 1982)(en banc), cert. denied 464 U.S. 1048 (1984); Harris v. Scully, 779 F.2d 875, 878 (2d Cir. 1985) ("Presenting the same legal issue essentially requires demonstrating that it is likely that the state court was alerted to the federal nature of the claim.")

We argued that the panel's decision imposed (and imposes) unduly restrictive conditions on "exhaustion" requirements -- beyond any intended or that ought to be required -- and that the Court should review the case on the merits and order the conviction vacated, even if a reversal may anger State prosecutors and judges.

Five months later, the Court denied rehearing (A1-2).

REASON FOR GRANTING THE WRIT

The Court Should Grant *Certiorari* To Clarify The Meaning Of The "Fair Presentation" Requirement Of The Habeas Rule; Especially Given The Fact That A Wrongfully-Convicted State Citizen Is Now Restricted By The AEDPA To His Or Her "One Bite At The Apple", The Federal Courts Should Not Restrict Federal Review Of Serious Constitutional Issues By An Unduly Restrictive Interpretation Of The Exhaustion Requirement

Exhaustion of state remedies is a well-recognized doctrine in habeas corpus jurisprudence. As stated in *Picard v. Connor*, 404 U.S. 270 ((1971), it reflects a policy of federal-state comity, an accommodation of our federal system designed to give the State the initial opportunity to pass upon and correct alleged violations of the Constitution. "It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied."

In an obvious maneuver designed to avoid controversy with the State Courts, the Second Circuit has carried the rule of exhaustion of remedies too far through the most extreme of crabbed interpretations. The Second Circuit's holding as to what it means for a claim to be "fairly presented" is not only demeaning to the State Courts, but has the incongruous effect of denying the very constitutional protection that habeas corpus seeks to assure.

This Court, in *Picard* and cases that followed it, *see e.g., Taylor v. Illinois*, 484 U.S. 400 (1988); *Gray v. Netherland*, 518 U.S. 152 (1996); *Lilly v. Virginia*, 527 U.S. 116 (1999), has emphasized that the federal claim must be "fairly presented" to the state court, not that a brief identical to the later-filed federal habeas brief be provided. This Court has, by example, indicated some basic principles that show that "fairly presented" should be read to include a claim of lack of fair "notice" when the State Court *itself* recognizes that the nature of the claim is one of notice.

The Second Circuit's decision here, however, muddies the meaning of "fairly presented" solely to "duck" review and to avoid undertaking the "unpleasant duty" (jurors are regularly told that they cannot act on that basis) of vacating State convictions that are just plain wrong! Notwithstanding the interpretations of this Court in post-Picard cases, the phrase "fairly presented" has been and thus is still susceptible to an unreasonable interpretation. *Certiorari* should be granted to clarify the meaning of this important doctrine.

In *Picard*, the Court held that a claim was not "fairly presented" simply on a showing that petitioner had presented

the State courts with all the *facts* necessary to state a claim for relief. The State prisoner must have also alerted the State court to the constitutional guarantee he claims was violated: he must present "the state courts with the same claim he urges upon the federal court. 404 U.S. at 276.

In the case before it, the Court found that the State court did not "have the opportunity to apply controlling legal principles to the facts bearing on the applicant's constitutional claim." While the applicant had presented facts, the particular constitutional claim arguably inherent in those facts (a denial of equal protection) was never brought to the attention of the State courts; the State courts had *dealt* only with the arguments offered in terms of State law (that the method by which his indictment had been amended violated Massachusetts law and the Fifth Amendment's requirement of a grand jury) . According to this Court, the State courts could not be faulted for failing to also consider *sua sponte* whether the petitioner had been denied equal protection.

This Court held that the basic question is "simply whether, on the record and the argument before it, the [State] Court had a fair opportunity to consider the [particular constitutional] claim and to correct that asserted defect in the respondent's conviction." *Id.* (Emphasis added) Though it answered the question negatively in the case before it, it recognized that there are obviously instances in which the "ultimate question for disposition" will be the same "despite variations in the legal theory or factual allegations urged in support," and cautioned that its ruling in *Picard* answering the question negatively should *not* be read as establishing the requirement that constitutional claims must be raised "only by

citing `book and verse on the federal constitution.'... We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts." *Id.* at 277 (citations omitted.)

In later cases, this Court indicated that a general appeal to the broad constitutional guarantee of "due process" might not adequately present the "substance" of a particular due process claim to the state court. See, *e.g.*, *Anderson v. Harless*, 459 U.S. 4 (1982) (in State court, the only manner in which petitioner had cited federal authority was by referring to a State decision in which the defendant had asserted a broad federal due process right to jury instructions that properly explain State law; the Court held that this was not sufficient to alert the State court to the *particular* claim developed in cases such as *Sandstrom v. Montana*, 442 U.S. 510 (1979), that the prosecutor prove all the elements of the crime beyond a reasonable doubt.)

While a *generic* reference to "due process" or "the Fourteenth Amendment" might not be sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights or a particular due process right, that is not what occurred here. And this Court has recognized that, in certain cases, reliance on a particular constitutional guarantee, though not even specifically mentioned, may be clear enough from "the authority cited by the petitioner" to justify the conclusion that the "claim" had been "fairly presented" to the State court. See, *Taylor v. Illinois* (484 U.S. 406, 409 n.9 (1988) (although petitioner expressly asserted only a due process violation, his reliance on the Sixth Amendment's compulsory process clause was clear from the authority he cited.)

Other cases indicate, moreover, that, in answering whether the State court had the opportunity to consider and correct the particular constitutional defect asserted in the habeas petition, the federal court must look not only to the petitioner's arguments and cited authority in State court, but also to the State court's response to the petitioner's arguments. In *Lilly v. Virginia*, 527 U.S. 116 (1999), for example, the State argued that the petitioner had not "fairly presented" a confrontation clause challenge to the admission of an accomplice's statements. Rejecting this argument, this Court noted that, while the petitioner had "focused on state hearsay law" in his challenge to the admission of the evidence, he had expressly argued that the admission of the statements violated his Sixth Amendment right to confrontation. Moreover, the Court found it significant that the State court had addressed the Confrontation Clause claim without mentioning waiver.

In this case, on the record and argument before it, the New York Court of Appeals *plainly* had a fair opportunity to consider the constitutional fair notice claim and to correct that asserted defect in Dr. Strogov's conviction. Indeed, it addressed the notice issue head-on, ruling that the "the language of the applicable Medicaid billing code unambiguously provided notice [emphasis added] that the creation of a three-dimensional cast of the patient's feet was required to seek reimbursement under this code."

The Court of Appeals' refusal to review the Constitutional claim on the merits is frightening in its implications. The panel's holding that, though the arguments in the State and federal habeas courts had provided "linguistic similarity", but that this was "not enough" to warrant the

conclusion that the Constitutional claim had been "fairly presented" to the State courts, so deviates from the notions expressed in *Picard* and protected by the rules of *habeas corpus* that review in this Court should be granted.

Whether or not Dr. Strogov cited "book and verse", or "interwove" the "notice" complaint with arguments regarding sufficiency of the evidence and the fundamental unfairness of a prosecution built on misrepresentations about historical facts and prior judicial opinions, she adequately alerted the State courts to the constitutional nature of her claims. She not only claimed that the code's terms were ambiguous on their face, and not only explicitly decried the lack of notice, but she pointed to the Rubin case and argued that, had she sought a legal opinion, she would have been advised that use of a three-dimensional cast was not "required" because of the "notice" that that case law had provided.. She also urged that State cases *upholding* the constitutionality of larceny prosecutions based on code section 90473 (all of which, however, had *post*-dated the conduct in this case, and *all* of which were based on the prosecutor's dishonest presentation that had hidden the significance of the Rubin concession that a plaster "cast" was not "required") were wrongly decided. This factual pattern and these arguments fall so squarely within the fundamental due process rule to the effect that a person of ordinary intelligence must receive fair notice that his contemplated conduct is forbidden before he can be prosecuted for that conduct, that no reasonable jurist could doubt that defendant's claim implicated a constitutional right.

As Justice Douglas wrote in his dissent in *Picard*, "The judges to whom that issue of law is tendered are learned men

[and women] who we must assume are knowledgeable as to the meaning of due process. A law student who tendered a brief that left due process at large would certainly not be worthy of an "A". But the nicety of analysis which we associate with scholarship has no functional role to play in this area of exhaustion of state remedies. When we go to that extreme, we make a trap out of the exhaustion doctrine which promises to exhaust the litigant and his resources, not the remedies." 404 U.S. at ___.

It has been years now since this Court has addressed the *meaning* of the term "fairly presented" in discussing the exhaustion requirement. Obviously, the meaning of the phrase -- especially in this era of post-AEDPA litigation, where a *habeas* petitioner must rely on the integrity of the judges who administer his or her "one bite at the apple" -- is an issue of extreme importance, and one that is repeated daily in federal courts.

CONCLUSION

This Court should grant *certiorari* and hold that a federal court should not read the "exhaustion" requirement so restrictively as to withhold review of serious Constitutional errors whose claims have in fact been fully considered by the State courts.

Indeed, because it is so clear -- with due respect to the Second Circuit -- that its ruling was an effort to *"duck"* the issue so that it could avoid the "unpleasant duty" of overturning State court decisions that were premised on misrepresentations and prosecutorial duplicity, this Court

would be justified in granting the Writ, holding the claim "exhausted", and vacating the conviction on the merits because of the patent violation of basic rules of "notice" and fair play.

April 2000

Respectfully submitted,

*VIVIAN SHEVITZ
JANE SIMKIN SMITH
5 Holly Branch Rd.
Katonah, New York 10536
(914) 767 0262
Counsel for Petitioners

*Counsel of Record

APPENDIX

JUDGMENT DENYING REHEARING DATED FEBRUARY 3, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

FILED
FEB 3 2000

Karen Grieve Milton
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of February two thousand.

Strogov,

Petitioner-Appellant Dkt. No.: 98-2382

v.

Attorney General

Respondent-Appellee

A petition for rehearing and a petition for rehearing en banc having been filed herein by the appellant Emilia Strogov.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en

banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GRIEVE MILTON, Acting Clerk

By: /s/_____
Beth J. Meador
Administrative Attorney

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inbancdn_frm

OPINION OF SECOND CIRCUIT

EMILIA STROGOV, Petitioner-Appellant, v. THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, by the Special Prosecutor for Medicaid Fraud Control, Respondent-Appellee.

Docket No. 98-2382

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

191 F.3d 188; 1999 U.S. App. LEXIS 21571

September 9, 1999, Decided

PRIOR HISTORY: [*1] Petitioner Emilia Strogov appeals from a judgment entered on April 15, 1998 in the United States District Court for the Eastern District of New York (Dearie, J.), denying her petition for a writ of habeas corpus with respect to her New York State conviction for grand larceny in the second degree, arising from her submission of fraudulent Medicaid billing claims for podiatric orthotic appliances.

DISPOSITION: Affirmed.

COUNSEL: VIVIAN SHEVITZ, Katonah, New York (Jane Simkin Smith, Katonah, New York, of counsel), for Petitioner-Appellant.

ARTHUR G. WEINSTEIN, Special Assistant Attorney General, New York, New York (Dennis C. Vacco, Attorney

General of the State of New York, Michael R. Berlowitz, Special Assistant Attorney General, New York, New York, of counsel), for Respondent-Appellee.

JUDGES: Before: VAN GRAAFEILAND, CARDAMONE, and CABRANES Circuit Judges.

OPINION: CARDAMONE, Circuit Judge:

Petitioner Emilia Strogov (petitioner or appellant) appeals from a judgment entered on April 15, 1998 in the United States District Court for the Eastern District of New York, before Judge Raymond J. Dearie, denying on the merits her petition for a writ of habeas corpus with respect to [*2] her State conviction for grand larceny in the second degree, arising from her submission of allegedly fraudulent Medicaid billing claims for podiatric orthotic appliances. Strogov's sole argument on this appeal is that her conviction should be vacated because the Medicaid billing code pursuant to which she submitted these claims failed to give her fair notice that it did not cover the claimed goods and services.

Petitioner insists that her State appellate briefs set out allegations that fairly put before the State courts her present contention that she was denied due process. Although there is some superficial similarity between her earlier arguments and her present ones, we conclude that these similar arguments were made in the service of distinct legal claims. Accordingly, we agree with the district court that Strogov has failed to exhaust her State judicial remedies for the claim she asserts in the federal habeas petition now before us. Because Strogov no longer has an opportunity to raise this claim in a State forum, and because she has not established any ground on which we may excuse her failure to exhaust her remedies, we affirm the

denial of her petition.

BACKGROUND

The [*3] New York State Medicaid Program (Program) makes medical care from participating health care providers available to financially needy persons. The health care providers may submit claims for reimbursement to the Program for the specific services provided. Between October 1984 and February 1988 appellant Emilia Strogov, a podiatrist participating in the Program, submitted pursuant to Medicaid billing code 90473 (Code 90473 or the Code) over 4,500 claims requesting reimbursement for orthotic appliances she furnished patients. During the years in question, Code 90473 read, "Foot mold, balance inlay support (casting and fabrication) per pair, to include all necessary fittings and adjustments," and claims submitted pursuant to this Code entitled participating physicians to reimbursement at the rate of $46 per pair of orthotic appliances.

On July 11, 1994 Strogov was convicted of grand larceny in the second degree, see N.Y. Penal Law § 155.40 (McKinney 1999), following a bench trial in New York State Supreme Court for Kings County. A person is guilty of grand larceny in the second degree when she steals property, the value of which exceeds $50,000. Id. The claims petitioner submitted [*4] to the Program were in excess of $200,000. Under New York law, a person may only be found to "steal[] property and commit[] larceny" when he takes property "with intent to deprive another of property or to appropriate the same to himself or a third person." See N.Y. Penal Law § 155.05 (emphasis added). At trial, the prosecution offered proof (1) that Code 90473 requires three-dimensional casting of patients' feet -- to permit customized fabrication of orthotic appliances

conforming to the "architecture" of individual feet -- and (2) that Strogov, nevertheless, consistently employed two-dimensional footprint and tracing techniques that only permitted the prescription of stock or pre-fabricated appliances. In Strogov's defense, her counsel attacked the prosecution's proof on the issue of intent. Counsel argued, among other things, that Code 90473 was ambiguous and thus did not give Strogov clear notice of the casting requirement. Relying on the asserted ambiguity of the Code, together with other evidence supposedly indicating Strogov's good faith, counsel maintained that the evidence was insufficient to support a finding of larcenous intent. Counsel further contended [*5] that his client had changed her practices in November 1987 after being notified by a professional publication of the casting requirement. Following conviction, Strogov was sentenced in New York to a prison term of one to three years and fined $256,984.

On June 12, 1995 petitioner's conviction was affirmed on her direct appeal to the Appellate Division of the New York State Supreme Court, which stated that the evidence of larcenous intent was sufficient to sustain the conviction and rejected Strogov's remaining contentions as "without merit." *People v. Strogov, 216 A.D.2d 424, 425, 628 N.Y.S.2d 721* (2d Dep't 1995). The New York Court of Appeals affirmed. See *People v. McDonald, 88 N.Y.2d 281, 644 N.Y.S.2d 670, 667 N.E.2d 320 (1996)* (consolidated appeal). New York's highest court noted that the "expert evidence [indicates] that the term 'casting' has a universally recognized meaning within the podiatric profession: creating a three-dimensional cast or mold," and concluded that "code 90473 is not ambiguous and sufficiently conveyed to podiatrists the requirement to use a casting technique that will create a three-dimensional mold of the foot." *Id. at 287.* [*6]

The Court of Appeals went on to rule that there was sufficient proof of intent to sustain Strogov's conviction, reasoning that the unambiguous terms of Code 90473, together with plainly misleading billing instructions petitioner had given her intern, provided evidence of larcenous intent. See *id. at 287-88.* It explained that Strogov had "instructed an intern to misrepresent the measuring techniques on each Medicaid patient chart as C-F-D, that is, cast, fabricate and dispense," despite the fact that Strogov actually ordered pre-fabricated stock items from tracings and footprints. *Id. at 288.* Strogov's remaining contentions were rejected as "either unpreserved or without merit." Id. In short, the crime of larceny for which appellant stands convicted is defined by her wrongful intent to purloin money from the State Medicaid program for services that she did not provide.

On May 1, 1996 Strogov filed a petition in the Eastern District of New York for a writ of habeas corpus, pursuant to *28 U.S.C. § 2254* (1994 & Supp. II 1996). In denying the petition by a memorandum and order dated March 31, 1998, Judge Dearie rejected [*7] Strogov's assertions that (1) the evidence of larcenous intent was insufficient to support the conviction, (2) her conviction was void by reason of allegedly perjured testimony given by a witness for the prosecution, and (3) her Sixth Amendment right to effective assistance of counsel was denied her due to her trial counsel's alleged conflict of interest. See *Strogov v. Attorney Gen., 1998 U.S. Dist. LEXIS 6232, No. CV 96-2133, 1998 WL 229120,* at *1-*5 (E.D.N.Y. Mar. 31, 1998). Judgment denying the writ of habeas corpus was entered on April 15, 1998. This appeal followed.

DISCUSSION

On appeal, we review de novo a district court's denial of a petition for a writ of habeas corpus. See *Dorsey v. Kelly, 112 F.3d 50, 52 (2d Cir. 1997).*

I Presentation of the "Fair Notice" Claim to the State Courts

On the merits of her appeal, Strogov argues that her conviction should be vacated because Code 90473 failed to give her fair notice, as required by the Fourteenth Amendment Due Process Clause, that her billing practices for the goods and services she furnished violated the law. See *United States v. Matthews, 787 F.2d 38, 49 (2d Cir. 1986)* ("When a person of ordinary [*8] intelligence has not received fair notice that his contemplated conduct is forbidden, prosecution for such conduct deprives him of due process."). Specifically, she asserts that Code 90473 failed to give her fair notice of the requirement that podiatric orthotic appliances had to be prepared from three-dimensional casts of patients' feet in order to qualify for reimbursement under the Code. The New York State Attorney General (Attorney General or respondent) contends, among other things, that appellant is barred from raising this argument in federal court on habeas review collateral to her conviction because she failed to present it to the State courts on direct appeal from her conviction.

A. The Exhaustion Requirement

Supreme Court precedent requires that "a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus." *Picard v. Connor, 404 U.S. 270, 275, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971)* (citing *Ex parte Royall, 117 U.S. 241, 29 L. Ed. 868, 6 S. Ct. 734 (1886));* accord *Dorsey, 112 F.3d at 52;*

Daye v. Attorney Gen., 696 F.2d 186, 191 (2d Cir. 1982) [*9] (in banc). This requirement, which derives ultimately from notions of comity between the federal and State judicial systems, is also codified by statute at *28 U.S.C. § 2254*(b) and (c). See *Dorsey, 112 F.3d at 52; Daye, 696 F.2d at 190-91.* To satisfy the exhaustion requirement with respect to a particular legal claim, the petitioner must fairly present it to the State courts in order that our sister judicial system may have a fair opportunity to consider the claim and correct any asserted constitutional defect in petitioner's conviction before recourse is sought in the federal courts. See *Picard, 404 U.S. at 275-76; Dorsey, 112 F.3d at 52.*

A federal constitutional claim has not been fairly presented to the State courts unless the petitioner has informed those courts of "all of the essential factual allegations" and "essentially the same legal doctrine he asserts in his federal petition." *Daye, 696 F.2d at 191-92* (citing, inter alia, *Picard, 404 U.S. at 276-77).* In other words, the claims presented by the petitioner to the State appellate courts must be the [*10] "substantial equivalent" of the claims he raises in the federal habeas petition. *Picard, 404 U.S. at 278.* In this context, a petitioner's presentation of the federal constitutional claim may assume any one of a number of permissible forms:

> The ways in which a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and verse of the Constitution, include (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Daye, 696 F.2d at 194.

B. Reliance on Factual Allegations in State Appellate Briefs

Strogov contends that her "fair notice" claim was fairly presented to the New York State courts in satisfaction of the exhaustion requirement. She refers to a number of passages from the district court record that reproduce submissions made to the Appellate [*11] Division and the Court of Appeals. In particular, petitioner maintains that her prior claims of insufficient evidence and of ineffective assistance of counsel rested on a factual basis that was alleged in her State appellate briefs with a legal "thrust" that lay sufficiently "within the mainstream of constitutional litigation," for purposes of fairly presenting her "fair notice" claim to the State courts. *Daye, 696 F.2d at 194, 197* (applying fourth criterion by analyzing factual basis in light of petitioner's assertion of "basic doctrine" on judicial bias in his State appellate brief).

In evaluating appellant's argument, we begin with the referenced passages she cites. Most of these passages pertain to her insistence that the evidence of larcenous intent was insufficient to support the conviction because (1) the witnesses differed as to whether Code 90473 required three-dimensional casting, thus suggesting an ambiguity in the Code's meaning in the podiatric community, and (2) Strogov's other conduct showed that she had been acting out of an honest, good-faith belief that her conduct was permissible. Another passage pertains to appellant's claim of ineffective assistance [*12] of counsel based in part on her trial counsel's failure to cite *People v. Rubin, 101 A.D.2d 71, 474 N.Y.S.2d 348* (4th Dep't 1984) (discussing the casting requirement). Because Rubin

supposedly held -- according to the referenced passage -- that a predecessor to Code 90473 did not require three-dimensional casting, Strogov contended that the case "raises issues of fair 'notice', as well as issues of . . . whether the Code provided a fair basis to impose criminal liability."

Turning first to Strogov's sufficiency of the evidence claim, it is apparent that she relied on the Code's purported ambiguity only in the service of a broader argument that the prosecutor had not adequately proven that she acted with the requisite level of criminal intent. It must be conceded that in the course of arguing that the ambiguity functioned to undermine any evidence of larcenous intent, Strogov stated that the Code failed to provide "fair notice." Despite the linguistic similarity between the "fair notice" aspect of her State court sufficiency claim, on the one hand, and the "fair notice" due process claim she presses in her federal habeas petition, on the other, these claims are otherwise distinct and cannot be said to be the "substantial equivalent" of one another. See *Picard, 404 U.S. at 278.* In order to demonstrate that she exhausted State court remedies, Strogov would need to show, as she has not done, that she presented the State courts with "essentially the same legal doctrine she asserts in her federal petition." *Daye, 696 F.2d at 191-92* (citing *Picard, 404 U.S. at 276-77).*

The ineffective assistance of counsel claim that Strogov pressed before the State courts similarly failed to present those courts with an opportunity to consider the "fair notice" due process argument she makes in the present action. Although appellant's State appellate brief asserted that Rubin implicated questions of fair notice as a basis to impose criminal liability, the logical conclusion to be reasonably drawn from these phrases, when viewed in context, is not that Strogov intended to raise an independent fair notice claim, but rather that she

thought her trial counsel was ineffective for failing to cite Rubin in rebuttal to the prosecution's proof of intent.

We pause to observe that a different problem would be presented were [*14] this a case in which the petitioner had presented a State claim of insufficient evidence to the State courts and then raised a functionally equivalent federal constitutional claim of insufficient evidence on her habeas petition. See *Evans v. Court of Common Pleas, 959 F.2d 1227, 1231-33 (3d Cir. 1992)* (citing Daye with approval and finding exhaustion in such a case); *Nadworny v. Fair, 872 F.2d 1093, 1097-1100 (1st Cir. 1989)* (same).

Nor is this a case in which the petitioner contends she was prevented from exhausting a claim in the State courts because of ineffective assistance of appellate counsel. See *Carpenter v. Mohr, 163 F.3d 938, 945-46 (6th Cir. 1998)* (recognizing such a claim). Rather, here petitioner presented claims of insufficient evidence and ineffective assistance on direct appeal in the State courts and only later attempted to raise a legally distinct fair notice claim in her federal habeas application. In such a case, our precedents hold that petitioner has not adequately presented her fair notice claim to the State courts.

The passages identified by Strogov did not effectively present her fair notice claim to [*15] the State courts, and we find no other passages in her State court briefs fairly presenting such a claim. In fact, other than the passages highlighted by appellant, the most relevant passage was a citation to People v. Donaldson, which addressed (and rejected) a similar fair notice claim with respect to Code 90473. *181 A.D.2d 948, 949, 582 N.Y.S.2d 288* (3d Dep't 1992). In some contexts, such "reliance on state cases employing constitutional analysis in like fact situations" will in

fact effectively present the federal constitutional claim to the State courts. *Daye, 696 F.2d at 194.* Here, however, Donaldson was cited to the Court of Appeals only in a footnote to a section of Strogov's brief complaining, on State law grounds, that the prosecution had erred in failing to release the prior testimony of a key prosecution witness. This passing reference to Donaldson in a completely unrelated context cannot be said, in any realistic sense, to have adequately presented her fair notice claim to the Court of Appeals. Thus, appellant has failed to exhaust her State judicial remedies with respect to her fair notice claim.

II Procedural Default

Finding a failure to exhaust [*16] State judicial remedies does not end our inquiry, since independent procedural considerations may bar a petitioner from returning to State court to pursue such remedies. In the present case, Strogov is precluded from seeking further direct review by the Court of Appeals, see N.Y. Rules of Court, Court of Appeals, § 500.10(a) (McKinney 1999) ("Only one application is available."), and her failure to raise her fair notice claim on direct review also forecloses her from seeking collateral relief from the New York courts, see N.Y. Crim. Proc. Law § 440.10(2)(c) (McKinney 1994). This provision requires State courts to deny motions for collateral relief where, inter alia, the State courts have not considered the claim on direct review "owing to the defendant's . . . unjustifiable failure to raise such ground or issue upon [his or her direct] appeal." N.Y. Crim. Proc. Law § 440.10(2)(c). Strogov has urged in the instant appeal that she actually raised her "fair notice" due process claim in the State courts -- an argument we reject above. She does not, however, argue in the alternative that any failure to raise the claim could be justified. As a consequence, because

she failed [*17] to raise her claim in State court and no longer may do so, Strogov's claim is procedurally barred.

In a case of procedural default in State court, the Supreme Court has explained, a federal court may reach the merits of the habeas petition only if the petitioner can demonstrate both cause and prejudice -- cause for the default and prejudice arising from imposing the bar of a default. See *Sawyer v. Whitley, 505 U.S. 333, 338, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992); Murray v. Carrier, 477 U.S. 478, 485-88, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986); Wainwright v. Sykes, 433 U.S. 72, 87-91, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977).* A further exception exists where the petitioner can show that the denial of habeas relief would leave unremedied a "fundamental miscarriage of justice," in the sense that because of a constitutional violation a person who is actually innocent has been convicted and incarcerated. See *Murray, 477 U.S. at 495-96.* Appellant makes no showing that her petition falls within these exceptions; we therefore decline to reach the merits of Strogov's petition. See generally *Washington v. James, 996 F.2d 1442, 1447 (2d Cir. 1993)* [*18] (addressing procedural default); *Grey v. Hoke, 933 F.2d 117, 120-21 (2d Cir. 1991)* (same).

CONCLUSION

Accordingly, for the reasons stated, the district court's denial of Strogov's petition for a writ of habeas corpus is affirmed.

OPINION OF NEW YORK COURT OF APPEALS

The People of the State of New York, Respondent, v. Robert McDonald, Appellant.
The People of the State of New York, Respondent, v. Emilia Strogov, Appellant.

No. 111, No. 112

COURT OF APPEALS OF NEW YORK

88 N.Y.2d 281; 667 N.E.2d 320; 1996 N.Y. LEXIS 675; 644 N.Y.S.2d 670

April 30, 1996, Decided

PRIOR HISTORY:

Appeal, in the first above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 8, 1995, which affirmed a judgment of the Supreme Court (Theodore T. Jones, Jr., J.), rendered in Kings County upon a verdict convicting defendant of grand larceny in the second degree and offering a false instrument for filing in the first degree (six counts).

Appeal, in the second above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 12, 1995, which affirmed a judgment of the Supreme Court (Sheldon Greenberg, J.), rendered in Kings County, after a nonjury trial, convicting

defendant of grand larceny in the second degree.

People v McDonald, 215 AD2d 504, affirmed.

People v Strogov, 216 AD2d 424, affirmed.

DISPOSITION:

Nos. 111 and 112: Order affirmed.

JUDGES: Chief Judge Kaye and Judges Simons, Titone, Bellicosa, Smith and Ciparick concur.

OPINIONBY: LEVINE

OPINION: [*285] [**321]

Levine, J.

Following a jury trial, defendant McDonald, a podiatrist enrolled as a participating provider in the New York Medical Assistance Program, was convicted of one count of second degree grand larceny (Penal Law § 155.40) and six counts of offering a false instrument for filing in the first degree (Penal Law § 175.35). In an unrelated bench trial, defendant Strogov, also a participating podiatrist, was convicted of second degree grand larceny. The basis for these convictions was defendants' submission of claims to the Medicaid program for [***10] custom-made orthotics "cast and fabricated" to the patients' feet with the knowledge that they had not in fact provided such appliances to these patients. The Appellate Division affirmed each conviction, [*286] holding that the language of the applicable Medicaid billing code unambiguously provided notice that the creation of a three-

dimensional cast of the patient's feet was required to seek reimbursement under this code (*People v McDonald, 215 AD2d 504; People v Strogov, 216 AD2d 424).* We agree and, because none of the remaining assignments of error requires reversal, we now affirm.

The New York Medical Assistance Program provides eligible persons with financial assistance for medical care and treatment. Participating physicians submit claims for reimbursement of services provided to program recipients according to the fee schedule contained in the local Department of Social Services Medicaid Provider Manual. The local provider manual must be consistent with the medical services and reimbursement caps prescribed by the State Department of Social Services (see, *18 NYCRR 538.*1). At issue in these appeals is the Kings County billing code 90473 (item P602 in the State podiatry fee schedule) which provides:

"Foot mold, balance inlay support (casting and fabrication) per pair, to include all necessary fittings and adjustments."

The maximum reimbursable rate under this billing code is $46.

Defendants were prosecuted for larcenies emanating from the submission of claims under billing code 90473 for orthotics they dispensed without making a cast or mold of the patient's feet. According to the trial evidence, the orthotics that defendants McDonald and Strogov billed under this code were ordered by sending either a tracing of the outline of the patient's feet or a pressure imprint obtained by coating the feet with a solution that interacted with specialized paper to indicate the patient's weight-bearing and pressure areas, with

or without additional prescriptive information, to a laboratory that provided prefabricated stock orthotics.

Defendants do not refute that these two-dimensional measurement techniques were used. They argue instead that the billing code phrase "casting and fabrication" is ambiguous, that the code does not require the creation of a three-dimensional cast or mold, and that the use of a tracing or footprint, in conjunction with additional descriptive information about the patient, provides sufficient information to enable an orthotic manufacturer to create a custom-made orthotic. They thus contend that their use of alternative methods of measurement for orthotics billed under this code does not constitute the crime of larceny as a matter of law.

At both trials, however, expert evidence was presented that the term "casting" has a universally recognized meaning within the podiatric profession: creating a three-dimensional cast or mold which captures the true architecture of the patient's foot and is then used to create a positive mold which forms the model for the custom-made orthotic. The experts explained that a two-dimensional outline or footprint does not constitute a cast that will conform to the actual shape of the patient's foot, and thus, such measuring methods cannot be used to create a custom-made orthotic. Accordingly, contrary to defendants' argument on appeal, the evidence established that code 90473 is not ambiguous and sufficiently conveyed to podiatrists the requirement to use a casting technique that will create a three-dimensional mold of the foot.

As the podiatry fee schedule is intended for use by members of the podiatric profession, the use of technical terms recognized by the profession to describe the scope of permissible work that can be billed under code 90473 provides

an explicit and nonarbitrary standard for enforcement of proper Medicaid billing practices and imposing criminal responsibility for flagrant violations thereof. Moreover, because the professionally defined meaning of casting excludes the use of foot tracings or footprints, defendants' limited rebuttal evidence was insufficient to demonstrate an ambiguity in the billing code or prove that their conduct constituted lawful and noncriminal billing practices.

Defendants alternatively argue that there was legally insufficient evidence that their submission of claims under code 90473 was done with larcenous intent. They contend that because the term casting is ambiguous, the mere act of submitting claims under code 90473 without the creation of a cast or mold does not provide circumstantial evidence of intent to defraud and that, as a consequence, the evidence of criminal intent was legally insufficient. Because we have already concluded that the terms "casting and fabrication" in code 90473 unambiguously require the creation of a cast or positive mold, we reject defendants' argument that billing for an orthotic made from a tracing or footprint does not constitute circumstantial evidence of larcenous intent.

Moreover, in each of these cases there was additional evidence that defendants intentionally sought reimbursement for a medical service that they did not provide. Defendant McDonald's former professional partner testified that he agreed with the experts' definition of casting and that he and defendant purposefully billed Medicaid for custom-made orthotics, which are ordinarily made from casts, when in fact they had dispensed prefabricated devices ordered from mere tracings. This witness also testified that at the suggestion of defendant the partners began using a billing code with a lower reimbursement rate for some of the orthotics normally billed under code

90473 to avoid the appearance of an improper pattern of billing.

As to defendant Strogov, there was evidence that although she ordered prefabricated stock items from tracings and footprints, she instructed an intern to misrepresent the measuring techniques on each Medicaid patient chart as C-F-D, that is, cast, fabricate and dispense. Thus, in each case, the evidence was legally sufficient to support the fact finder's conclusion that defendants' improper billing was done with criminal intent.

We have considered defendants' remaining contentions and conclude that they are either unpreserved or without merit.

Accordingly, in each case the order of the Appellate Division should be affirmed.

Chief Judge Kaye and Judges Simons, Tauten, Bellicose, Smith and Ciparick concur.

In each case: Order affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 98-2382

EMILIA STROGOV,

Petitioner-Appellee,

v.

THE ATTORNEY GENERAL OF THE
STATE OF NEW YORK by the Special
Prosecutor for Medicaid Fraud Control

Respondent-Appellant,

On Appeal From The United States District Court
For The Eastern District of New York

PETITION FOR REHEARING WITH SUGGESTION OF REHEARING EN BANC

Vivian Shevitz (VS6943)
Attorney for Appellant
5 Holly Branch Road
Katonah, New York 10536
(914) 767-0262

PETITION FOR REHEARING OR REHEARING EN BANC

PRELIMINARY STATEMENT

On September 9, 1999, a panel of this Court affirmed the district court's denial of *habeas* relief for Petitioner Emilia Strogov. It did so by finding, after considering the matter for some nine months, in the face of a claim of innocence, and despite the showing that the State prosecutors had lied and dissembled to achieve and sustain her conviction in State court, that we had not fairly presented the "claim" to the State courts which we raised before this Court.

The panel held that, though there was "superficial similarity" between Dr. Strogov's earlier arguments in State court and her "present one" -- centered on inadequate "notice" within a Constitutional sense that what she did violated State grand larceny laws -- the "claims" were "distinct", that Dr. Strogov had thus failed to exhaust State remedies, and since she could no longer do so, this Court could (and *should*) affirm.

With due respect to the panel, the Court's decision is either marred by its having overlooked language in the New York Court of Appeals' own opinion that the affirmance was based on a claim of lack of "notice" – language that I *specifically* pointed out to the panel during oral argument – or it is but a continuation of the unfair, "political" "easy way out" of "taking on" and sanctioning the completely unprincipled conduct of the State prosecutor and State courts in pursuing and affirming a conviction premised on misrepresentations and lies.

I wish I could say it in a "nicer" way. But I can't. Having seen the Court of Appeals of the State of New York simply *ignore* a serious issue concerning how its prosecutors made the courts believe that the issue had been different in a prior case, when it was not, without even commenting on the prosecutorial dissembling demonstrated in briefs in this case, it is hard to swallow this Court's stamp of approval on the conclusion through a crabbed interpretation of "exhaustion" principles. Frankly, it is the type of decision that makes counsel question whether it is "worth it" to continue the practice of criminal defense.

Moreover, the panel's reasoning is inconsistent with prior cases holding that the "claim" must be fairly presented to the State courts. The fact that the New York State Court of Appeals *decided* the issue on the basis of "notice" (as its opinion states), demonstrates that the "claim" was fairly presented. That is, and should be, all that is required, under the decisions of this Court.

While we have little reason to hope at this stage for a court to stand up to the prosecutors here, we respectfully and urgently seek reargument. To the extent that the panel refuses to reconsider, the *en banc* court ought to look at this, as a matter of fairness, good policy, and justice.

The Claim *Was* "Fairly Presented"

The panel here held that we had not "fairly" presented the issue of whether Code 90478 -- a Medicaid billing code dealing with "balance inlay supports", otherwise known as orthotic appliances -- gave "fair notice" in a Constitutional sense to a podiatrist who actually provided the appliances to

her patients, that, unless she were to use a *plaster cast* to measure the patients' feet, she could not seek reimbursement for $46 from Medicaid and that her conduct in seeking such reimbursement would constitute the *crime* of Grand Larceny. The panel "conceded" here that "in the course of arguing that the ambiguity" in the Code provisions "functioned to undermine any evidence of larcenous intent", Appellant "stated that the Code failed to provide `fair notice'". (Panel Op., 1999 U.S. App. LEXIS 21571, p. *12-- reprinted in the Addendum to this Petition). However, this, according to the panel, though providing "linguistic similarity", was not enough to fairly present the "claim" to the State courts.

This is a strained ruling, to say the least. It is especially strained since the York Court of Appeals did appreciate that the notions of "void for vagueness" discussed by appellant before the State courts embodied the "claim" of "fair notice".

In the State Court of Appeals' opinion, the Court specifically discussed the "claim" in terms of "notice". The Court thus wrote (with my emphasis added) (People v. Strogov, 88 N.Y.2d 281, 285-86, 644 N.Y.S.2d 670 (1996)):

The basis for these convictions was defendants' submission of claims to the Medicaid program for custom-made orthotics "cast and fabricated" to the patients' feet with the knowledge that they had not in fact provided such appliances to these patients. The Appellate Division affirmed each conviction, holding that the language of the applicable Medicaid billing code unambiguously provided notice that the creation of a three-dimensional cast of the patient's feet was required to seek reimbursement under this code (*People v McDonald, 215 AD2d 504; People v Strogov, 216 AD2d 424).*

We agree and, because none of the remaining assignments of error requires reversal, we now affirm.

Not only did the State Courts thus have an *opportunity* to consider appellant's "federal" claim; they did decide it, holding (improperly) that appellant had received "fair notice". There is no principled basis on which this Court could, or should, refuse to consider the claim raised here on the basis that the issue was not fairly "exhausted". The highest State Court's opinion shows that it decided the "claim".

The panel should reconsider, based on the language in the Court of Appeals' opinion. If the panel did not *overlook* the argument we made that shows what "fair consideration" has meant in the past, discussed again below, it either overlooked, or chose to ignore, the "notice" language in the Court of Appeals' affirmance, pointed out at oral argument explicitly (as the tape will show). Either way, this should not be the basis for affirmance. It is the wrong way "out". There should be no "out" at all!

The Panel's Decision Conflicts With Prior Law Concerning The Meaning of "Fair Presentation" of A Habeas Claim

The panel's decision here not only deprives this Petitioner of review over misconduct of the worst sort on the part of New York State prosecutors -- conduct that served to hide from state courts the fact that the prior controlling decision had held the exact opposite of their theory of prosecution in this case -- but it conflicts with prior decisions of this Court and others concerning "exhaustion", its requirements, and its purposes. Thus, the law is that a habeas

petitioner must have "informed the state courts of both the factual and legal premises of the claim he asserts in federal court." Daye v. Attorney General, 696 F.2d 186, 191 (2d Cir. 1982)(en banc), cert. denied 464 U.S. 1048 (1984). This, the Petitioner plainly did!

The prosecutor here did not dispute that the factual issues before this Court were and are the same as those before the State court; the sole contention was that the legal basis was not. But the "legal" basis was before the State courts.

"Presenting the same legal issue essentially requires demonstrating that it is likely that the state court was alerted to the federal nature of the claim." Harris v. Scully, 779 F.2d 875, 878 (2d Cir. 1985) (citing Daye, 696 F.2d at 192. This does not mean that the claim must be stated "explicitly," Holland v. Scully, 797 F.2d 57, 64 (2d. Cir. 1986), or that a petitioner "cite the same cases" to the state court that he cites to the federal Circuit Court, Harris, 779 F.2d at 878, or even that there can be "no substantial difference in the legal theory advanced to explain an alleged deviation from constitutional precepts." Daye, 696 F.2d at 192 n.4. Rather, this Court has agreed in the past, a habeas petitioner may be said to have adequately alerted the state courts to the constitutional nature of his claims in a variety of circumstances including "the allegation of a pattern of facts that is well within the mainstream of constitutional litigation." Id. at 191.

The panel disregarded these basic rules. It held that though Appellant "concededly" argued that there was a lack of notice in arguing that there was "ambiguity" such as would negative "criminal intent", this was not sufficient, because, despite "linguistic similarity", the claims were "distinct". This, with all due respect, ignores that the State judges are and

presumably should be *familiar* with the principle that a controlling decision of the State court that belies a theory of prosecution at the same time shows a lack of "fair notice" and Constitutional "vagueness". Plainly, the allegation of these facts in this case was "well within the mainstream of constitutional ["fair notice"] litigation", such as to make it fair to say that the State Courts had an opportunity to consider the Constitutional issues in this case. Daye, supra, 696 F.2d at 191, 192 n.4.

With all due respect, the panel's contrary reading would "protect" the State court judges beyond any fair intendment of the "exhaustion" rules. After all, the issue for exhaustion analysis is whether the State courts have had an adequate opportunity to "deal with" the problem, to reduce the issue to its bottom-line purpose.

Given the extensive briefing in the State courts in this case, and the almost *ad nauseam* (but necessary) reliance on the holding of the controlling State case at the time of Appellant's (supposed-) "offense" conduct that flatly contradicted the basis of the prosecution's theory of Appellant's conviction, it is hardly fair to hold that the State Court justices did not appreciate the "federal nature" of the claim. To the contrary, "fair notice", and "void for vagueness", raise federal claims "within the mainstream of Constitutional litigation" concerning Due Process bases for conviction, and the State court judges had the opportunity to consider the federal claim. That the State Court chose to affirm without even commenting rather than "taking on" the prosecutors there and explaining why the prior case was not controlling, should have prompted federal concern, not deference!

Just as it took an *en banc* Court to pronounce the principles of Daye, an *en banc* case, the *en banc* Court should require adherence to these basic principles. It is already "hard enough" for a State prisoner to achieve review of an unfair conviction. To impose unduly restrictive interpretations of "exhaustion" requirements beyond this should not be allowed.

Review On The Merits Should Result In Reversal And A Granting Of The Writ, Even Though The Reversal May Anger State Prosecutors And Judges; The Basis For The Conviction Was And Is Unfair. The State Court Should have Given Appellant Relief; The District Court Should Have Acted.

Appellant, a responsible podiatrist, was prosecuted for grand larceny because of her receipt of reimbursement under a Medicaid billing code that stated only what it pertained to: "balance inlay supports", "(casting and fabrication)". Appellant was prosecuted and convicted for providing orthotics produced by a measurement system that did not involve use of a *plaster* cast, but rather were made by a "foot-print" method produced by liquid placed on the bottom of the foot that produced a two-dimensional picture of the foot showing where pressure points may lie. That picture, *along with the podiatrist's directions* to an orthotist, was used to make the "inlay supports" which were actually given to the patients.

This case (unlike some earlier cases, involving dishonest podiatrists) thus did not involve billing for appliances that were not provided. Moreover, numerous patients testified about appellant's care of them and made it clear that she (or her precepts) had actually examined the patients each time.

The fee Code that served as the basis of the prosecution did not spell out any requirement that a podiatrist must

measure a patient's feet by "plaster casting". There was no published rule, regulation, statute, case or even position statement by Medicaid administrators that a three-dimensional mold was required at the time of Dr. Strogov's conduct. The sole basis for appellant's conviction was the testimony of a Medicaid agent (Dr. Guy) who testified based on hearsay (based on his position with Medicaid for years) that the Code "required" a plaster cast, and had always required a plaster cast in order to support reimbursement at the $46 level.

The only published case -- the only published anything --on the issue at the time Dr. Strogov submitted her claim forms to Medicaid using the code section seemingly showed that the Code had not "always" required a plaster cast. That case was People v. Rubin, 101 A.D.2d 71 (4th Dept. 1984), in which -- based on Medicaid's own expert's testimony -- the court had expressly rejected the Medicaid Fraud prosecutor's theory that a three-dimensional mold was "required". Presumably, this holding should have obviated further prosecution of a podiatrist -- at least one whose *only* "offense" was using this fee Code number. (Other podiatrists whose "offenses" had included other conduct, like not dispensing anything at all, had been prosecuted earlier). But whenever the argument was made, the Medicaid Fraud prosecutor misrepresented that Rubin had actually involved some "other" Code section -- some "local" Erie county code -- that had not contained the same language, "(casting and fabrication)".

We discovered this bald-faced lie only when the case was in the Appellate Division, and only by going back to the voluminous trial transcripts in the Rubin case, and seeing what it actually involved (which had not been clearly stated in the Rubin opinion, but which prosecutors were *plainly* aware of,

since the same appellate prosecutor in this case had been involved in Rubin. Shockingly, when we tried to show what actually happened in the State courts, the prosecutors argued *stare decisis*, refused to admit they were wrong, and *continued* arguing that the Code section was "different". Instead of remedying the wrong, the State court shockingly ignored it!

Thus, in our New York Court of Appeals' brief (in the Appendix in this case before this Court), we went back to the first case in which the Appellate Division, Second Department, had upheld use of the same fee Code used against Petitioner here, which was then used as *stare decisis* in rejecting Appellant's claim in this case on direct appeal. In its appellate brief in that case, People v. Feldman, 204 A.D.2d 347 (2d Dept. 1994)(excerpted in our Appendix at A.303), the same Medicaid Fraud prosecutors argued that there was no evidence that the Code provision meant anything *other* than what the word "casting" supposedly "clearly" meant that a "plaster cast" was "required" to avoid a conclusion of larceny. In response to the defendant's argument premised on Rubin's *apparent* meaning, the Medicaid prosecutors stated that there was a "critical distinction[]" between Rubin and this case in that Rubin involved a "substantially different, local billing code". (Resp.Br., People v. Feldman, p.24, included at A.303 (emphasis added). (In Feldman, by the way, the Court also based its conclusions on principles of fair "notice", as well as "vagueness" or "ambiguity").

In response to our brief in the appellate division below, in which we wrote, before having found the Rubin record and briefs, that the Medicaid correspondence and the conclusions drawn in Rubin showed the courts' conclusion in Feldman ought to be revisited, prosecutor Weinstein continued to assert

(A.300) that Rubin involved some "Erie County procedure code" that had "defined a `P602' appliance" [the former number of the same code provision] differently, and that, "[u]nder the State-wide code, 90473, which is what this case is about, the words in parenthesis are `casting and fabrication' and the Rubin court had no occasion to address those terms".

What we found in the Rubin files, however, totally belied the prosecutor's continued claims.

Page 47 of the Medicaid Fraud prosecutor's brief in the Rubin case (reproduced in our Appendix at (A.194)), indeed, shows the prosecutor's argument in that case that there were many "interpretations" of the word "casting" as used in the same Medicaid fee Code (then numbered P602). The prosecutor made this argument in response to the defendant's argument there that the prosecutor was trying to shift positions, after the Medicaid experts testified in that case that a plaster cast was in fact not "required". The excerpt reads:

> During his opening statement, the prosecutor, in charging that Rubin furnished something other than P602 appliances, referred to the fact that Rubin "was putting down the fee code that he had done the casting and fabricating." R51. In so saying, the prosecutor was not attempting to define that fee code in all its various interpretations [emphasis added]. He was simply referring to the literal language of the fee code. As he had just

> told the jury moments before, "there is a fee code for what's called casting and fabricating of foot appliances" R49-50. In fact, fee code P602 is defined as "Foot mould, balance inlay support (casting and fabricating)". Peo.Exh. #217, emphasis added. [We add our emphasis to the entire definition].

This excerpt not only showed the prosecutor's concession that there were different "meanings" to the undefined term "casting" in the Fee Code, but that the *language* of the fee Code at issue in Rubin was the same as that involved here, and *did* contain the terms "(casting and fabrication)".

When we showed this to the New York Court of Appeals, and also showed them the *exhibit* in Rubin that established that what was at issue was not a "local" code, but rather "a fee schedule promulgated by New York State [emphasis added] for podiatrists treating Medicaid patients", it seemed that the Court of Appeals should have been concerned.

Incomprehensibly, however, it did not even once in its decision comment on the showing we made. Instead, it affirmed the conviction, holding that there had been fair notice to appellant because of the supposed "clear meaning" of the term "casting" (as the prosecutor continued to argue), on relied on the prior cases in which the prosecutor had hid from the Courts the true import of Rubin.

As we argued in the Court of Appeals, Rubin had sent a message to the podiatry community about the meaning of the state code, and its meaning was that a plaster cast was not required. This is an issue of "fair notice" at least. The State courts should have done something other than allow the unjust conviction to stand for fear, or unwillingness, to un-do what prosecutors in the past unjustly "achieved".

For the en banc court members, we add this: At oral argument, Judge Van Graafeiland, out of "nowhere", indicated that appellant's argument was worthless because he had looked in the dictionary and found that "casting" implied a plaster cast. That "seat-of-the-pants" conclusion was what drove the prior courts that did not fully consider the issue.

We asked for, and got permission to, file a supplement to our briefs in response to Judge Van Graafeiland's statement at oral argument, as to which we had had no prior notice. The *en banc* Court should consider that submission along with the briefs. If the panel is unwilling to do it, the Court as a whole should grant reconsideration, find the claims to have been *more* than "fairly presented" to the State courts, and should do what they were unwilling to do: vacate an unfair conviction.

An Innocent Person Was Convicted Here

The panel in this case also held that we made no showing that there was a "fundamental miscarriage of justice" in the sense of that a "person who is actually innocent has been convicted and incarcerated." (Opinion, LEXIS, p.17). It baffles me that the panel could take this position.

Appellant is an innocent person who was practicing her profession honorably and was convicted of something that is

not a crime! We urge the Court to read the prior submissions in this case.

CONCLUSION

For the above stated reasons, the Court should grant rehearing, find the claim "exhausted", and "right" the "wrong" done here. Not only has appellant been unfairly convicted, in violation of the Constitution, but the entire course of dealing with this case is a threat to our system of justice and liberty.

Instead of fairly considering appellant's claims, which would have required reigning in prosecutorial overreaching and holding that prior decisions had been based on misconceptions, all the Courts that have considered the issue in this case, including, respectfully, the panel herein, have gone to extremes to "duck". It cannot be pleasant to take on the State courts. But the members of this Court are sworn to the Constitution, not the upholding of the State courts' prior decisions. The panel should reverse itself, seeing that the Court of Appeals of the State of New York did decide the "notice" claim; or the *en banc* Court should set the record straight and give this fine woman relief from an unconstitutional conviction.

Dated: September 14, 1999

Vivian Shevitz (VS 6943)
Attorney for Appellant
5 Holly Branch Road
Katonah, New York 10536

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that --

(A) the applicant has exhausted the remedies available in the courts of the State; or
(B)(i) there is an absence of available State corrective process; or
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable

fact finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official.

....

Opinion of District Court Denying Habeas Relief

EMILIA STROGOV,

Petitioner,

v.

ATTORNEY GENERAL OF THE STATE OF NEW YORK, by the Special Prosecutor for Medicaid Fraud Control,

Respondent.

CV 96-2133 (RJD)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

1998 U.S. Dist. LEXIS 6232

March 31, 1998, Decided

DISPOSITION: [*1] Petitioner's application for writ of habeas corpus denied.

COUNSEL: For EMILIA STROGOV, petitioner: Vivian Shevitz, Esq., Shevitz, Meyers, Gette & Dizon, Mt. Kisco, NY.

JUDGES: RAYMOND J. DEARIE, United States District Judge.

OPINION BY: RAYMOND J. DEARIE

OPINION: MEMORANDUM & ORDER

DEARIE, District Judge.

Petitioner Emilia Strogov filed this § 2254 petition challenging her New York State conviction on one count of Larceny in the Second Degree. After a non-jury trial, she was found guilty and sentenced to one to three years imprisonment and a fine of $ 256,984.

Background

Strogov, a podiatrist, was convicted for submitting Medicaid claims for patient services she did not perform. She billed Medicaid under fee code 90473 for "casting and fabrication" of customized orthotics, without creating three-dimensional casts or molds of her patients feet. Each fraudulent claim listed Medicaid billing code 90473, which reads: "Foot mold, balance inlay support (casting and fabrication) per pair, to include all necessary fittings and adjustments," and which reimburses providers at a rate of $ 46 per pair. Petitioner does not dispute that during the relevant period, she submitted claims using this code for orthotics prepared from two-dimensional measurements -- taken by tracing the outline of the patient's foot or by applying a staining solution to the foot and then making an imprint. Evidence at trial showed that during a three and a half year period between 1984 and 1988, Strogov used code 90473 to bill Medicaid for 4,589 orthotic appliances, for which she did not create three-dimensional molds. Resp. Brief to N.Y. Ct. of App. ("Resp. Brief") at 14-15. She argues, however, that the evidence at trial was legally insufficient to establish that she intended to defraud Medicaid.

The Appellate Division affirmed Strogov's conviction, concluding that the language of code 90473 was not ambiguous. The court found that code 90473 gave notice on its

face that in order to bill under this code, a podiatrist was required to have created a three-dimensional mold or cast of the patient's foot. People v. Strogov, 216 A.D.2d 424, 628 N.Y.S.2d 721, 722 (2d Dep't 1995). On April 30, 1996, the New York Court of Appeals agreed, concluding that expert testimony at trial established "that the term 'casting' has a universally recognized meaning within the podiatric profession: creating a three-dimensional cast or mold which captures the true architecture of the patient's foot and is then used to create a positive mold which then forms the model for the custom-made orthotic." People v. McDonald, 88 N.Y.2d 281, 287, 644 N.Y.S.2d 670, 667 N.E.2d 320 (1996). Accordingly, the Court of Appeals found that the requirement of the billing code was not ambiguous, and that there was sufficient evidence of intent to defraud. Id. In confirming that there was sufficient evidence of criminal intent, the Court of Appeals referenced the testimony of Strogov's intern, who was a witness for the prosecution. The intern testified that Strogov had instructed her to write C-F-D ("cast, fabricate, and dispense") on patient charts, when only tracing or impressions of feet were done. Id. at 288.

Discussion n1

-Footnotes- - - - - - - - - - - - - - - -

n1 The 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA") mandates a more deferential standard of review for federal habeas corpus petitions. See 28 U.S.C. @ 2254(d). The Second Circuit has held that the AEDPA does not apply retroactively; that is, when it "attaches new legal consequences to events completed before its enactment." See Boria v. Keane, 90 F.3d 36, 37-38 (2d Cir. 1996) (quoting Landgraf v. USI Film Products, 511 U.S. 244, 270, 128 L. Ed. 2d 229, 114 S.

Ct. 1483 (1994)). The AEDPA became effective on April 24, 1996, while this application concerns a trial that took place in 1994. It appears that applying the new statute to events occurring before April 24, 1996 would constitute a retroactive application. The Court need not decide the retroactivity question because Strogov's petition fails under either standard.

- - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - [*4]

1. Sufficiency of the Evidence

Petitioner Strogov contends that her conviction was based on legally insufficient evidence of criminal intent. Pet. P 4. The standard for reviewing sufficiency of the evidence asks whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); see also United States v. Rosa, 11 F.3d 315, 337 (2d Cir. 1993), cert. denied, 511 U.S. 1042, 114 S. Ct. 1565, 128 L. Ed. 2d 211 (1994). The Supreme Court has cautioned that under Jackson, "the assessment of the credibility of witnesses is generally beyond the scope of review . . . The mere existence of sufficient evidence to convict would be determinative of petitioner's claim." Schlup v. Delo, 513 U.S. 298, 330, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995).

Dr. Strogov contends that the Medicaid fee code did not unambiguously require a podiatrist to have made three-dimensional casts, and therefore, she did nothing wrong by using measurement techniques that she in good-faith believed [*5] were proper. Pet. PP 4, 6. The trial record, however, reflects substantial evidence that the podiatrist community understood code 90473 to require a

three-dimensional mold of a patient's foot. At trial, Dr. Joseph Guy, Director of the Health Department's Medical Management Information System, testified that code 90473 "requires that the provider take a plaster cast of the patient's foot, form a positive mold from that, and create an orthotic that conforms to the mold." Trial Tr. 122, Resp. Brief at 4. He stated that "the key . . . is whether or not there is a casting that is being done." Id. The witness continued:

A: It has to do with the amount of time and effort for which provider is being paid. We have alternatives for those who do not cast.
Q: And there are other codes that can be billed?
A: Yes, there is [sic].

Id. at 123. On cross-examination, Dr. Guy reiterated that "casting means casting." Id. at 152, Resp. Brief at 5. Another expert, Dr. John Walter, chairman of an orthopedics department, also testified that a practitioner would understand the terms "cast and fabrication" in code 90473 to mean "a cast or positive mold." Id. at 317-19, 342-44. [*6] The chairman of orthopedics at petitioner's college of podiatry testified that the school had never taught tracing or imprints as an acceptable substitute for plaster casting to create foot molds. Id. at 791-97, Resp. Brief at 7. A former orthopedic laboratory president testified that fabricated orthotics could only be manufactured from a cast -- "generally understood as a three-dimensional impression." Id. at 723-27, Resp. Brief at 10. Additional evidence of criminal intent came from Strogov's intern's unequivocal testimony that Dr. Strogov directed her to write "C-F-D" for all Medicaid orthotics that she had measured by tracing or taking imprints. Id. at 573-81, 619.

Strogov did not testify at her trial, and did not call any expert witnesses to refute the testimony of the prosecution's experts. In her defense, Strogov argued that her open use of the C-F-D notation demonstrated her honest belief that the method of measurement was not the relevant factor for billing. She also introduced Department of Health documents suggesting that the requirement of code 90473 was not unambiguous. To show that she lacked the intent to defraud, Strogov argued at trial that she changed [*7] her measurement practices after receiving a letter from the Podiatric Association announcing that plaster or biofoam imprints must be used in order to bill under code 90473 for custom orthotics.

Petitioner concedes "that habeas relief is rarely (if ever) granted" on the basis of Jackson. Pet. P 25. This Court's role is not to assess the weight of the evidence and determine whether the fact-finder correctly found guilt beyond a reasonable doubt. In this case, drawing all permissible inferences in favor of the prosecution, a reasonable fact-finder could have concluded that the elements of second degree larceny were proven beyond a reasonable doubt. See Jackson, 443 U.S. at 319.

2. Conviction Based on "Lies"

Strogov claims, unconvincingly, that her conviction is unconstitutional because "it was based on false evidence, which the prosecutor knew or should have known was false." Pet. P 4. Strogov mischaracterizes Dr. Guy's testimony. Dr. Guy testified that "casting means casting" and that to his knowledge, the Department of Health had never acknowledged any ambiguity in the meaning of code 90473. Trial Tr. 129-31, 174-75, Resp. Brief at 24. While petitioner cloaks her [*8] argument in rhetorical outcries, there is absolutely no evidence

that Dr. Guy's testimony was perjurious or that the prosecutor's argument was unfair, or that either was inaccurate.

Strogov also misconstrues the holding of the Appellate Division's opinion in People v. Rubin, 101 A.D.2d 71, 474 N.Y.S.2d 348 (4th Dep't 1984). In Rubin, the defendant-podiatrist's conviction was overturned because of an improper jury instruction, not because the court found that the code in question did not require casting. Id. at 76-77. In any event, Rubin involved a different factual context. See People v. Holmberg, 91 N.Y.2d 874, 663 N.Y.S.2d 334, 335-336 (3d Dep't 1997) (distinguishing Rubin scenario from the requirements of code 90473). While the language of the state code at issue in Rubin tracks that in code 90473 (as petitioner maintains), an Erie County guidelines handbook for practitioners interpreted the state code as follows: "A foot mold, balance, inlay support must be cast in plaster, castefoam or impression paper (e.g., pedograph, phenophthalein). . . ." Appellant's Appendix to N.Y. Ct. of App. ("Appellant's App.") at A220-21 (emphasis added). Given this [*9] interpretation, the Fourth Department acknowledged that two-dimensional measuring techniques, such as pedographs, were acceptable. See Rubin, 101 A.D.2d at 74-75. This is not the case here.

3. Ineffective Assistance

Dr. Strogov contends that she was denied her Sixth Amendment right to effective assistance of counsel due to her trial counsel's alleged conflict of interest. Pet. P 31.

On cross-examination, Strogov's trial counsel David Ruck asked Dr. Guy whether the doctor had appeared in 1988 before a group of podiatrists, to address the issue of ambiguity in the

Medicaid code. Dr. Guy answered that he had appeared at the meeting at Ruck's invitation, but stated that he did not recall telling the group that the language of code 90473 was ambiguous:

Q: Do you recall what you told them [at the 1988 meeting]? A: Not in specific detail. . . .
Q: And do you recall telling the group at that time that the wording of the code, of that particular code, was ambiguous and unclear? A: No, I am afraid I don't.

Trial Tr. 153-57, Appellant's App. at A150-54. Ruck also asked Dr. Guy whether he recalled a 1990 discussion with Ruck on the issue of ambiguity in the billing [*10] code:

Q: Do you recall speaking with me in September of 1990? A: Not specifically, no. I know I have talked to you over time on various issues. . . .
Q: Well, do you recall, Dr. Guy, that once again we discussed this particular issue, the concern about the ambiguity of the parenthetical casting and fabrication in the 90473 fee code?
A: No, I am sorry, I don't recall.

Id. at 159-60.

Petitioner argues, in a rather conclusory fashion, that "Ruck had been a witness to key prior inconsistent statements by the very witness whose testimony was the basis of the case against his client," and therefore Ruck should have become a witness himself. Pet. P 32.

This issue comes to the Court in a somewhat unusual posture. Although the issue has apparently been exhausted, and is therefore properly before the Court, it has not been developed

beyond petitioner's assumption that Mr. Ruck was in a position to challenge Dr. Guy's recollection. Petitioner proposes that this Court should assume, based on the cross examination, that her trial attorney could have testified that on two occasions Dr. Guy had acknowledged some ambiguity in code 90473. However, no court has heard from [*11] Mr. Ruck, or any of the podiatrists in attendance at the 1988 meeting. No affidavits have been filed to support petitioner's claim that Ruck had heard Dr. Guy concede that code 90473 was ambiguous.

Petitioner seemed to acknowledge these stark limitations to her claim of conflict in her brief to the Appellate Division, where she observed that "some of Ruck's ineffectiveness must be developed in an application pursuant to CPL @ 440.10 that we will be preparing and submitting shortly." Appellant's Brief to N.Y. App. Div ("Appellant's Brief") at 65. Surprisingly, no such application was ever made. A similar lapse in follow-through may be seen in petitioner's presentation, for the first time, to this Court of handwritten notes, purportedly written by Mr. Ruck. Petitioner claims that these notes support her assumption about the nature of Mr. Ruck's contacts with Dr. Guy. Again, the notes are not accompanied by an affidavit explaining the circumstances of their sudden and tardy emergence, or even attesting to their authentication.

What petitioner lacks in substance, she tries to make up with unfounded accusation. To advance her claim that Mr. Ruck faced a conflict of interest, Strogov suggests that Mr. Ruck's allegedly deficient performance might be explained by his "discomfort because of [his] prior relationship with the People's witnesses." Appellant's Brief at 67-68. Few of those involved in prior proceedings in this case have escaped the petitioner's strident criticism. But this unfortunate suggestion

is, in this Court's view, grossly inappropriate, and immediately belied by even a casual reading of Mr. Ruck's cross examination of Dr. Guy.

Although couched in terms of a conflict of interest, petitioner is, in essence, challenging the competency of counsel, and the question is appropriately addressed under Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). See United States v. O'Neil, 118 F.3d 65 (2d Cir. 1997). Under the familiar framework of Strickland, a defendant is required to show "(1) that his attorney's performance fell below an 'objective standard of reasonableness,' and (2) that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Kieser v. New York, 56 F.3d 16, 18 (2d Cir. 1995) (quoting Strickland, 466 at 688, 694).

No reasonable view of Mr. Ruck's vigorous examination of Dr. Guy would support the slightest inference that counsel labored under a conflict of interest, or that his performance fell below an objectively reasonable standard of competence. Most notably, Mr. Ruck established through his questioning of Dr. Guy that there was concern within the podiatric professional community that the billing code was ambiguous. Indeed, Dr. Guy acknowledged speaking to the group about their concern regarding ambiguity in the fee schedule. Trial Tr. 160, Appellant's App. at A153. In light of this acknowledgment, Dr. Guy's inability to recall a purported 1990 conversation with Mr. Ruck "about the concern about the ambiguity of the parenthetical casting and fabrication in the 90473 fee code" is hardly significant. Id. at A157. The information critical to the defense, that some practitioner believed the code to be ambiguous, had been established; whether Dr. Guy believed the 90473 code ambiguous was of relatively little significance.

The Court has considered Strogov's remaining arguments, and finds them without merit.

For the reasons stated above, petitioner's application for a writ of habeas corpus is denied. The Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: Brooklyn, New York
March 31, 1998
RAYMOND J. DEARIE
United States District Judge